87-2059

IN THE

Supreme Court Of The United States

October Term, 1987

No.

DANIEL R. MIRRO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals decision below should be reviewed for the following reasons:

I. Whether the evidence at the trial of this matter, pursuant to the due process clause of the Fifth Amendment of The United States Constitution was sufficient from which a reasonable trier of fact could have found beyond a reasonable doubt that Petitioner Mirro was operating or driving a motor vehicle.

II. Whether unavailability of transcript, or an inaudible tape recording of the Magistrate's proceedings as required by 18 USC 3401(e) combined with an inaccurate Summarization of Proceedings presented by said Magistrate in lieu of said transcript deprives Petitioner of his right to due process under the law and mandates a remand of this matter for new trial.

David L. Hamilton was a Co-Defendant in the case in the Courts below.

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TABLE OF AUTHORITIES

OPINIONS BELOW

This Appeal is based upon an unpublished opinion of the United States Court of Appeals for the Fourth Circuit, handed down in the following case on February 3, 1988:

United States v. Daniel R. Mirro, No. 87-5597 (4th Cir. 1988)

and Order denying Petition for Rehearing and Motion to Stay Mandate entered March 22, 1988;

Mirro, supra.

JURISDICTION

THE JUDGMENT OF THE FOURTH CIRCUIT COURT OF APPEALS WAS ENTERED FEBRUARY 3, 1988. PETITION FOR REHEARING AND MOTION TO STAY MANDATE WAS DENIED BY JUDGMENT ENTERED MARCH 22, 1988. THIS COURT HAS JURISDICTION UNDER 28 USC Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATISES AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES
Amendments to the Constitution

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18, UNITED STATES CODE
Section 3401(e)

Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording equipment. For purposes of appeal a copy of the record of such proceedings shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefore, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

RULES OF PROCEDURE for the TRIAL OF MISDEMEANORS before UNITED STATES MAGISTRATES

Rule 5

Record

Proceedings under these rules shall be taken down by a reporter or recorded by suitable sound recording equipment. In the discretion of the magistrate or, in the case of a misdemeanor or than a petty offense, on timely request of either party as provided by local rule, the proceedings shall be taken down by a reporter. With the written consent of the defendant, the keeping of a verbatim record may be waived in petty offense cases.

Rule 7(c)

Record

The record shall consist of the original papers and exhibits in the case together with any transcript, tape, or other recording of the proceedings and a certified copy of the docket entries which shall be transmitted promptly by the magistrate to the clerk of the district court. For purposes of the appeal, a copy of the record of such proceedings shall be made available at the expense of the United States to a person who establishes by affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 10

The Record on Appeal

(C) Statement on the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

CODE OF VIRGINIA (1950), AS AMENDED
Section 18.2-266

It shall be unlawful for any person to drive or operate any motor vehicle, engine or train (i) while such person has a blood alcohol concentration of 0.10 percent or more by weight by volume as indicated by a chemical test administered in accordance with the provisions of Section 18.2-268, or (ii) while such person is under the influence of alcohol, or (iii) while such person is under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature. For the purpose of this section, the term "motor vehicle" shall include mopeds, while operated on the public highways of this Commonwealth.

STATEMENT OF THE CASE

This is Petition for a Writ of Certiorari from the decision of the denial of Appeal of the decision of the United States District Court for the Eastern District of Virginia, Alexandria, Virginia Division, affirming the judgment and sentence of the Magistrate that Petitioner Mirro, along with one David L. Hamilton, occupants of a single vehicle, were both guilty of driving under the influence and Petitioner Mirro was guilty of driving on a suspended license, all arising out of an arrest by United States Army Military Police on a portion of U.S. Route 1, which passes through or adjacent to portions of Fort Belvoir, a United States Military Reservation, located in Fairfax County, Virginia, in the Eastern District of Virginia. On June 9, 1987, Appellants Mirro and Hamilton were tried in the United States Magistrates Court, in Alexandria, Virginia, the Honorable Leona M. Brinkema presiding, on supplemental informations charging each with driving under the influence after having been convicted of the same offense once within five (5) years and once within five (5) to ten (10) years of the offense appealed from herein, pursuant to 18 USC 13, assimilating Section 18.2-266, Code of Virginia (1950), as amended, and upon summons charging Petitioner with driving on a suspended license, again in violation of 18 USC 13, assimilating Section 46.1-350, Code of Virginia (1950), as amended. This Petition for Writ of Certiorari concerns itself with Petitioner Mirro's conviction for driving while under the influence, only, pursuant to 18 USC 13, assimilating Section 18.2-266, of the Virginia Code, as aforesaid.

The Petitioner Mirro waived his right to trial by a United States District Judge and to trial by jury in writing. Petitioner was tried by the Magistrate without a jury on May 4, 1987. On June 9, 1987, Petitioner Mirro was sentenced to six (6) months confinement and a $500.00 fine, the fine being suspended as to the driving while intoxicated conviction. The

Petitioner noted his appeal. On June 19, 1987, the appeal from the Magistrate's decision was argued before the Honorable Claude M. Hilton in the United States District Court for the Eastern District of Virginia, Alexandria Division. The case was continued to June 22, 1987, at which time the District Court affirmed the judgment and sentence of the Magistrate and an appeal was had to the United States Circuit Court of Appeals for the Fourth Circuit. This Petition for a Writ of Certiorari is taken from the affirmation of the lower courts' decisions by the Fourth Circuit and its denial of Petitioner's Motion for Rehearing and Motion for Stay of Mandate.

The facts and record in this case are, indeed, in dispute. Petitioner's version of the fact is as follows. Petitioner was arrested in the early morning hours of February 9, 1987, by two Military Policemen from Fort Belvoir, Virginia, on U.S. Route 1 South (Richmond Highway). This highway passes adjacent to and through portions of Fort Belvoir. The Military Police testified that they first observed a vehicle later identified as a vehicle in which Petitioner was an occupant after it had stopped on the northbound shoulder of U.S. Route 1 near Lieber Gate of Fort Belvoir. Over Petitioner's objection the Military Police testified they believed the area was within the Special Maritime and Territorial jurisdiction of the United States because they had been told or shown where the boundaries were by superior officers in whom they believed. They also testified they had made other arrests in the area and had never been found without jurisdiction as a result thereof.

Petitioner's Co-Defendant testified that the truck in which the Petitioner was an occupant had initially stopped in an area without the Special Maritime and Territorial jurisdiction of the United States, which area was admitted to have been without said jurisdiction although a clear controversy exists in the testimony as to whether the vehicle was within or without said jurisdiction.

Military Policeman Dunlap testified that he concluded

Petitioner was the driver of the vehicle he first saw stopped since he saw Mirro exit the driver side and walk around the truck to the rear of said vehicle, touching the vehicle while he walked and observed him enter the passenger side door. Military Policeman Daniels testified that Mirro exited the driver side and walked around the front of the truck, not the rear, and re-entered on the passenger side. Upon direct examination, neither Military Policeman was able to identify Mirro as being an operator of a vehicle pursuant to Section 18.2-266, Code of Virginia (1950), as amended, although Military Policeman Dunlap later testified upon additional direct examination, *sua sponte,* on the part of the U.S. Magistrate, that he had seen the vehicle moving on the highway prior to its initial stop.

Subsequent to the aforesaid alleged observations, the vehicle in which Petitioner was a passenger proceeded North up Route 1 and was observed to weave and was subsequently stopped by the aforesaid Military Policemen who testified that Petitioner and the driver of the vehicle (then clearly Hamilton) appeared to be intoxicated. Both men were placed under arrest although no field sobriety tests were performed. Breathalizer tests were administered. Testimony was elicited that Mirro's test indicated a blood alcohol count of 0.17% blood alcohol by volume and a certificate was offered for admission although the record fails to disclose that the same was ever admitted by the Magistrate.

Hamilton took the stand and testified implicitly he was the driver of the vehicle and he and Mirro had exited the vehicle at Walker Gate as a lighted cigarette had fallen onto the seat or other portion of the interior of the vehicle. Petitioner Mirro did not testify. Rebuttal testimony with regard to Mirro's operation or alleged operation of the vehicle was offered. Petitioner rested and moved, for the second time, for a judgment of acquittal, which, again, for the second time, was denied. Petitioner Mirro was thereupon found guilty and

sentencing was had as aforesaid.

Petitioner timely requested a transcript of the trial proceedings prior to sentencing and hired a court stenographer to transcribe the tapes of said proceeding. Ann Fielder, Court Stenographer, indicated that the tapes were inaudible and could not be transcribed. (Note: Ms. Fielder did not have the original transcribing equipment available to her for this purpose.)

An appeal was taken to the United States District Court and hearing was continued from June 19, 1987, to June 22, 1987, to allow determination to be made as to whether a transcript of the Magistrate's proceeding could be had. The tapes could not be located and the Court Stenographer, who had previously attempted to transcribe the tapes, certified that she was able to transcribe only a portion of the tape containing Hamilton's testimony. A Summary of Proceedings was provided by the Magistrate, the contents of which were bitterly disputed by then counsel for Petitioner as inaccurately setting forth the proceedings which had occurred at the trial and disputing portions of the Magistrate's summary as inaccurate. Subsequent to the noting of the appeal and at approximately the same time as the hearings thereon in the United States District Court, the Magistrate's Office finally located the original tapes and discovered that Ann Fielder had been given only one of the two tapes available. The second tape was transcribed, but portions thereof containing Defendants' objections to the use of the Department of Motor Vehicles records, containing the alleged admission of that Petitioner's BAC Certificate, containing Closing Arguments and the reasoning, if any, for the Magistrate's decision, were inaudible. In fact, the Joint Appendix presented on appeal to the United States Circuit Court in this matter exhibits no fewer than 45 inaudible portions in 45 pages contained therein. Those 45 pages do not constitute the entire transcript which could be transcribed much less an unknown number of pages incapable

of transcription.

Among those items disputed by Petitioner as set forth in the Magistrate's Summary aforesaid as being incorrect or inaccurate are the failure of the Magistrate to recognize the inherent and critical disparity in testimony between the two Military Policemen observing the individual identified as the Petitioner, one testifying he went around the rear of a North facing truck and one testifying he went around the front of a North facing truck, observing approximately sixty (60) feet from said truck; the fact the Magistrate indicates an admission of Certificate of Analysis whereas the transcription clearly shows there was no admission of said Certificate; the fact that the Magistrate has no independent recollection of the Petitioner's having objected to the admission of his Virginia Division of Motor Vehicles driving record due to unavailability of tapes and transcript, although, when finally available and transcribed the record clearly indicates a vigorous objection thereto by counsel for Petitioner; a failure to address the fact that Hamilton testified that *he* (emphasis added) stopped the vehicle when the cigarette was dropped, a clear indication of his operation of the vehicle as opposed to Petitioner; and a failure of the Magistrate to annunciate her reasoning for her finding of guilt despite unresolved contradictions in the record as known through the aforesaid partial transcription of trial and her summarization presented by the Magistrate fraught with omissions.

ARGUMENT

I. WHETHER THE EVIDENCE AT THE TRIAL OF THIS MATTER, PURSUANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WAS SUFFICIENT FROM WHICH A TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT PETITIONER MIRRO WAS OPERATING OR DRIVING A MOTOR VEHICLE.

The Government failed to meet its burden of proving beyond a reasonable doubt that Petitioner Mirro was operating a motor vehicle within the Special and Maritime Jurisdiction of the United States District Court for the Eastern District of Virginia, Alexandria Division.

In order to convict one of driving under the influence of alcohol, intoxicants or drugs, it is necessary to prove two issues: the defendant operated or drove a motor vehicle; and the defendant was under the influence of alcohol, intoxicants, or drugs at the time of said operation. *Nicolls v. Commonwealth,* 212 Va. 257, 184 S.E.2d 9 (1971). At the time of this particular apprehension and trial, Section 18.2-266, Code of Virginia (1950), as amended, provided that it was unlawful to operate a motor vehicle within the State of Virginia with a blood alcohol count of 0.15% or greater. Thus, the Government may rely upon two criteria to support conviction: one, that a BAC of 0.15% or greater and operation of the motor vehicle existed, or, without any such BAC, the defendant was operating said motor vehicle *and* (emphasis added) a defen-

dant was operating the motor vehicle while under the influence of alcohol, intoxicant or under the influence of drugs. In the instant case, despite the Summarization of the Magistrate, the record clearly reflects that the Certificate of Blood Alcohol adduced by the Government was *never* admitted, thereby necessitating an affirmative finding that Petitioner was both operating the vehicle and under the influence of intoxicants at the time.

Under the alternative method by which a conviction may be obtained, the Government must present, at the very least, circumstantial evidence from which a reasonable inference can be drawn that the defendant was the driver of the motor vehicle. *United States v. Wilmer,* 799 F.2d 495 (9th Cir. 1986). Contradicted testimony that Petitioner was behind the wheel of the vehicle after it was first observed does not prove that Mirro was operating the vehicle. The only direct evidence of Petitioner's purported operation of said motor vehicle is inherently incapable of reasonable inference of such operation since said direct evidence purports to have Petitioner undertaking precisely opposite movements at the same point and time and said operation is directly contradicted by the testimony of a Co-Defendant who has absolutely no stakehold interest in so testifying, since he clearly was found to be the operator when the vehicle was initially stopped by the arresting Military Policemen in the instant case. Yet the record does disclose that in cross-examination of Mr. Hamilton, the Government itself concedes his (Hamilton's) operation of the motor vehicle at the time it was first observed.[1]

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[1]By Captain Donovan:

Q: And the reason you stopped the vehicle -- the reason the vehicle was stopped was because a cigarette was lost somewhere?

By Hamilton:

A: Yes, I dropped a cigarette.

Q. And *you stopped it* to retain it. Was it lit or --

A. Yes. We looked for the cigarette (J. App. p. 73).

Of critical importance in the instant case is the fact that although the Government contends that Petitioner's Blood Alcohol Certificate was in fact admitted, it is clear that before a ruling was made, Petitioner's attorney requested that any such admission be made subject to cross-examination. The record discloses no admission prior to cross-examination and no admission subsequent to cross-examination.

As a result of the foregoing facts, both undisputed and disputed, the issue which is presented is whether the record is adequate under the circumstances herein. *United States v. McCulloch*, 562 F. Supp. 103 (E. Dist. Tennessee 1983). This issue is critical in the present case since it is clear that an appeal is limited to all reasonable inferences consistent with the results obtained on judgment or appeal, as the case may be. *United States v. Orrico,* 599 F.2d 113 (6th Cir. 1979).

This Court must determine whether the record, as presented, in facts most favorable to the Government, allows this Court to draw the conclusion that the Trial and Appellate Courts were, in fact, correct, i.e., Petitioner, pursuant to the facts of the case was guilty beyond a reasonable doubt of the offense charged. Guilt beyond a reasonable doubt must be based on substantial evidence. Substantial evidence has been clearly defined as:

> "... more than a mere scintilla. It means such relevant evidence as a responsible mind might accept to support a conclusion. It is evidence affording a substantial basis of fact from which the fact and issue can be reasonable inferred . ..." *United States v. Green*, 548 F.2d 1261, 1266 (6th Cir. 1977).

No "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" under the foregoing facts since substantial evidence simply did not exist. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). See also *United States v. MacDougall,* 790 F.2d 1135, 1151 (4th Cir. 1986).

II. WHETHER UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE INCOMPLETE NATURE OF THE TAPES OCCASIONING THE SUMMARIZATION OF PROCEEDINGS BY THE MAGISTRATE DENIES DUE PROCESS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND PURSUANT TO 18 USC 3401 AND THE RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES.

Section 3401(e) of Title 18 of the United States Code provides that:

> "Proceedings before United States magistrates under this section *shall* be taken down by a court reporter or recorded by suitable sound recording equipment." (emphasis added)

Said Section goes on to state that a copy of the record of such proceedings *shall* be made available without expense to an indigent defendant.

Rule 7 of the Rules of Procedure for the Trial of Misdemeanors before United States magistrates similarly requires under subsection c thereof that:

> "The *record* shall consist of the original papers and exhibit in the case together with *any transcript, tape or other recording of the proceedings*

. . . ." (emphasis added).

Rule 7 similarly requires a copy of such record be made available free of cost to an indigent defendant.

Petitioner in the instant matter has never maintained to this Court, or any other Court, and does not now maintain that he is, in fact, indigent. Quite to the contrary, counsel of record in proceedings prior to the Petitioner's filing of a Motion for Rehearing in the United States Circuit Court and his present counsel were both retained by him.

Therefore, the issue presented to this Court is a strict due process question: Is Petitioner as a non-indigent defendant, wherein no waiver of a right to the keeping a verbatim record has been made pursuant to Rule 5 of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates has been obtained, be entitled to less on appeal than is an indigent defendant.

Section 3401(e) of Title 18 of the United States Code, clearly mandates the use of a court reporter or recording by suitable equipment for purposes of preserving the record of proceedings in trials by United States Magistrates. It makes no mention whatsoever of the use of a Summarization of the Magistrate's recollection of such proceedings as being a substitute for the verbatim record required under Rule 5 aforesaid. Absent a written consent of the Petitioner/Defendant herein, Rules 5 and 7 of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates and 18 USC 3401(e) have been violated. Said violation is prejudicial to the Defendant and denies him due process.

The literal tenets of the aforesaid Rules and law have been applied by the United States Circuit Courts such that proceedings in Magistrate's Courts absent a written waiver of record are deficient and convictions where no records of the proceedings are had should be set aside. *United States v. Robinson,* 495 F.2d 30 (4th Cir. 1974), *Estrada-Rosales v. I.N.S.*, 645 F.2d 819 (9th Cir. 1981).

It has long been held by this Court that an indigent defendant seeking appeal *in forma pauperis* is entitled to the transcript of the entire testimony and evidence adduced at trial as well as the Court's charge to the jury in order that he can be properly be represented (or represent himself) in appeal. See for example, *Hardy v. United States,* 84 S.Ct. 424, 375 U.S. 277, 11 L.Ed. 331 (1964). Is it possible, therefore, that a non-indigent defendant is not entitled, at his own expense, to the same entire testimony and evidence adduced at trial for purposes of his appeal? Despite this apparent contradiction, the Court of Appeals chose to ignore the issue of transcript availability upon appeal. This compounded the error of the United States District Court Judge in permitting the Magistrate's Summarization in lieu of recorded proceedings stating that the situation lent itself to a procedure under Rule 10(c) of the Federal Rules of Appellate Procedure. Invoking Rule 10 in this regard ignores the mandate of 18 USC 3401(e).

If, in fact, one accepts the notion that Rule 10 of the Federal Rules of Appellate Procedure is applicable under the present circumstances, the Summarization of the Magistrate's proceedings can *never* be used in lieu of the Appellee/ Government's objections or proposed amendments to the Appellant's statement of the evidence in proceedings. If this were the case, there would be no need for an adversarial proceeding among the United States Courts since the Judge would not be an impartial trier of fact and law, but the agency of the Government, only, and not of the body politic.

In light of the mandates of law and treatment accorded the Petitioner as a result of the unavailability of the entire transcript of the proceedings before the United States Magistrate in the instant proceeding, and the unconscionable rationale offered to a non-indigent defendant as a result of said unavailability as opposed to its mandated availability to an indigent, conviction of Petitioner Mirro must be reversed and remanded for a new trial.

CONCLUSION

For the foregoing reasons, the Petitioner urges this Court to issue a Petition of Certiorari to review the decision below.

Respectfully submitted,

PETER WARREN STEPHENS, ESQUIRE

JEFFREY T. TWARDY, ESQUIRE

APPENDIX

Filed June 22, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

UNITED STATES OF AMERICA,
Appellee,

v. Cr. No. 87-00151-A

DANIEL MIRRO
Appellant.

ORDER

Appeal from the judgment of the United States Magistrate for the Eastern District of Virginia, at Alexandria, on June 22, 1987. Appearances of defendant with counsel, Kenneth Smith and U.S. Attorney. Arguments heard.

On consideration whereof, it is now here ORDERED and ADJUDGED by this Court the judgment of the said United States Magistrate appealed from, in this cause, be and the same is hereby AFFIRMED.

Bond is continued for ten (10) days to allow defendant to file his appeal and thereafter until said appeal is heard.

/s/ Claude M. Hilton

United States District Judge

June 22, 1987

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5596

United States of America,

Plaintiff-Appellee,

versus

David L. Hamilton,

Defendant-Appellant.

No. 87-5597

United States of America,

Plaintiff-Appellee,

versus

Daniel R. Mirro,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude M. Hilton, District Judge. (CR-87-150-A, Cr-87-151-A)

Argued January 8, 1988. Decided February 3, 1988

Before WINTER, Chief Judge, and PHILLIPS and WILKINS, Circuit Judges.

Kenneth Warren Smith (Smith & Smith on brief) for Appellants; Catherine Donovan, Special Assistant United States Attorney, Office of the Staff Judge Advocate (Henry E. Hudson, United States Attorney on brief) for Appellee.

PER CURIAM:

David Hamilton and Daniel Mirro were convicted, following a bench trial before a federal magistrate, of driving while intoxicated (third offense in ten years) and operating a motor vehicle after suspension of license, in violation of Virginia law as it applies to federal enclaves through the Assimilative Crimes Act, 18 U.S.C. § 13 (1982). The district court affirmed the convictions, and Hamilton and Mirro appealed to this court. We find none of the asserted grounds for reversal to be meritorious and therefore affirm.

I

Hamilton and Mirro were arrested on the evening of February 9, 1987, while they were driving north on U.S. Route One, which passes through portions of Fort Belvoir, a federal military enclave. The arresting officers were two Fort Belvoir military policemen, who first noticed Hamilton and Mirro when the truck in which they were traveling pulled over to the side of the road near the Fort's Lieber Gate. The officers saw a man get out of the truck on the driver's side, walk unsteadily around the rear of the vehicle, and climb into the passenger's seat. At the same time, they saw a second man get out of the truck on the passenger side, walk around the vehicle, and climb into the driver's seat. The truck then drove off down Route One, weaving in and out of its lane. After following it for some time, the officers pulled it over and asked the occupants to get out. Hamilton climbed out of the driver's seat, and Mirro got out on the passenger side. Both men smelled strongly of alcohol and had trouble standing. Each produced a driver's license upon request, but Mirro's had the word "REVOKED" stamped across it.

The officers took Hamilton and Mirro down to the police station, where they were given breathalizer tests. The

machine showed Hamilton's blood alcohol level to be .22 and Mirro's to be .17. When the officers learned that the licenses of both men were currently under suspension, they charged each of them with driving while intoxicated and operating a motor vehicle while under suspension of license, in violation of Va. Code Ann. §§ 18.2-66 and 46.1-350, as assimilated by 18 U.S.C. § 13. Several weeks later, the government filed a superseding information notifying the defendants that it intended to seek the enhanced penalties available under Va. Code Ann. § 18.2-270 for the violation of Va. Code Ann. § 18.2-266, alleging that the defendants each had two previous offenses for driving while intoxicated within the past ten years.

Hamilton and Mirro waived their rights to trial before a jury, entered pleas of not guilty, and consented to be tried together before a federal magistrate. At trial, the government introduced, over the defendants' objection, copies of their Virginia Division of Motor Vehicles (DMV) records, which revealed the prior offenses and suspensions. The magistrate found Hamilton guilty of driving while intoxicated (third offense in ten years), but not guilty of driving while under suspension, because there was no evidence that he knew his license had been suspended. As for Mirro, who had been carrying a license marked "REVOKED," the magistrate found him guilty of both driving while intoxicated (third offense in ten years) and driving while under suspension. The defendants appealed their convictions to the district court, which affirmed. This appeal followed.

II

On appeal, Hamilton and Mirro claim first that the trial court lacked subject matter jurisdiction over this prosecution because the government failed to produce sufficient evidence that the offenses charged were committed within a federal enclave. They concede that Fort Belvoir is a federal

enclave, but argue that the government did not prove that the portion of Route One on which they were driving was within its confines. We disagree. Although territorial jurisdiction must be proven in these assimilative crimes cases, the prosecution is not required to establish it by proof beyond a reasonable doubt, as it must the substantive elements of an offense. Rather, the prosecution need only prove the jurisdictional fact by a preponderance of the evidence. *See United States v. Bowers,* 660 F.2d 527, 531 (5th Cir. 1981) (that offense occurred on military enclave). Applying this standard of proof, we find that the government met its burden of proving that the offenses charged occurred within a federal enclave. Two experienced military policemen testified that they knew the boundaries of Fort Belvoir and were certain that the portion of Route One on which they arrested the defendants was within those boundaries. This evidence, viewed in the light most favorable to the government, was more than sufficient to support a finding that offenses charged were committed within the boundaries of Fort Belvoir, and that in turn was sufficient to support federal jurisdiction.

Hamilton and Mirro claim next that there was insufficient evidence of their prior DUI offenses to justify the imposition of § 18.2-270's more severe penalties, because the government's only evidence of the prior offenses, the certified copies of their DMV records, was inadmissible as hearsay. This argument has no merit, for the records, which were self-authenticating under Fed. R. Evid. 902(2), were admissible under the public records exception to the hearsay rule, Fed. R. Evid. 803(8)(A).

Mirro contends that there was insufficient evidence that he was driving the truck to support his conviction on either charge. We disagree. It is undisputed that there were only two men in the truck. One of the military policemen testified that he saw Mirro climb out of the driver's seat immediately after the truck pulled over to the side of the road, and that he saw

Hamilton climb out of the passenger seat at the same time. We think this evidence, viewed in the light most favorable to the government, was sufficient to support an inference that Mirro was driving the truck when it stopped near Lieber Gate. *See United States v. Wilmer,* 799 F.2d 495, 502 (9th Cir. 1986) (evidence that defendant's arm was seen waiving out window on driver's side sufficient to support finding that he was operating the vehicle).

Finally, Mirro contends that his conviction for driving while under suspension must be reversed because there was insufficient evidence that he knew his license had been suspended, citing *Bibb v. Commonwealth,* 183 S.E.2d 732 (Va. 1971) (to support conviction under § 46.1-350, government must show accused knew his license had been suspended). This argument has no merit. The license Mirro was carrying at the time of his arrest had the word "REVOKED" stamped across it, and we think this was sufficient to support an inference that Mirro had actual knowledge that his license had been suspended, notwithstanding the use of the more severe term "REVOKED."

We find the remaining allegations of reversible error to be without merit. The convictions are therefore affirmed.

AFFIRMED.

Filed March 22, 1988
U.S. Court of Appeals
Fourth Circuit

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5597

United States of America

Plaintiff - Appellee

versus

Daniel R. Mirro

Defendant - Appellant

On Petition for Rehearing.

ORDER

Upon consideration of the appellant's petition for rehearing and motion to stay mandate,

IT IS ORDERED that the petition for rehearing and motion to stay mandate are denied.

Entered at the direction of Judge Phillips with the concurrence of Chief Judge Winter and Judge Wilkins.

For the Court,

/s/ John M. Greacen

CLERK

IN THE UNITED STATES DISTRICT COURT FOR
THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
V.	)	Magistrate Case No. 87-252M
	)	
DAVID L. HAMILTON	)	
	)	
UNITED STATES OF AMERICA	)	
	)	
V.	)	Magistrate Case No. 87-253M
	)	
DANIEL R. MIRRO	)	

I. PROCEDURAL BACKGROUND

On February 9, 1987, the defendants were arrested by the Fort Belvoir military police and charged with driving while intoxicated and driving after their licenses had been suspended. Criminal informations were filed on March 2, 1987, and on March 24, 1987, each defendant was charged by a superseding criminal information with driving while intoxicated, having been previously convicted within the past ten (10) years of two other driving while intoxicated charges under 18.2-266 of the Virginia Code.

The defendants appeared with counsel on May 4, 1987, waived their rights to a trial before a district court judge and by jury, entered not guilty pleas and proceeded to trial. HAMILTON was found guilty of driving while intoxicated (third offense within ten years), and not guilty of operating after suspension. MIRRO was found guilty of driving while

intoxicated (third offense within ten years), and of operating after suspension.

Presentence reports were requested. On June 9, 1987, the defendants' motions for a judgment of acquittal were heard. Defendants argued that the certified copy of the Division of Motor Vehicles' record was insufficient evidence of their earlier convictions. The motion was denied, the court finding that the record was sufficient.

HAMILTON was then sentenced to six months incarceration, and fined $500, which fine was suspended. His operator's license was suspended indefinitely. MIRRO was sentenced to six months incarceration on the DWI conviction, and fined $500, which fine was suspended. His operator's license was suspended indefinitely. On the operating after suspension charge he received a ten day jail sentence, and a $100 fine which was suspended. The ten days was consecutive to the six months. The magistrate directed that both defendants receive alcohol treatment while in custody.

The defendants made an oral motion for bail pending appeal. The motion was denied, the magistrate finding that the appeal does not raise a substantial question of law or fact likely to result in reversal. That decision was reversed by a district judge on June 12, 1987.

In their appeals, defendants argue there was insufficient evidence to support their convictions, lack of jurisdiction of the court, absence of a trial record, the sentence imposed, and denial of bail.

II. SUMMARY OF EVIDENCE

The government called three witnesses. Specialist Vincent Dunlap testified that he has been a military police officer for four years and has been stationed at Fort Belvoir since 1985. Around 1:10 a.m., on February 9, 1987, Dunlap was walking to his car by Lieber Gate when he noticed a red

pickup truck going northbound on Route 1, pull off to the side of the road. He saw a man whom he identified as defendant MIRRO get out of the driver's side of the truck, walk around the back of the truck. While doing so, MIRRO held on to the tailgate. Another man, whom Dunlap identified as defendant HAMILTON got out of the passenger side of the truck, and walked around the truck and entered the driver's side. Dunlap was approximately sixty feet from the truck when he saw these events.

Dunlap got into his patrol car and started to follow the truck up Route 1. He testified that based on his training and experience he knew that the area of Route 1 by Lieber Gate and the areas where he followed the truck are within the jurisdiction of Fort Belvoir. As he followed the truck he could distinguish the two males whom he had just seen switch places. He saw the truck weave in and out of its lane and he pulled it over about 200 meters down the road.

When he approached the truck, the smell of alcohol was strong. When MIRRO got out of the passenger side he had to keep his left hand on the hood to avoid falling. HAMILTON wobbled when he stood up. Both defendants were swaying so badly the officer could not give them field sobriety tests.

Both defendants were taken to the military police station where they were watched for an hour. HAMILTON seemed very care-free. After HAMILTON was given a Breathalyzer test the police found he had sneaked a mint into his mouth.

On cross-examination, Dunlap said he first saw the truck around 1:10 a.m. and that he was sure the truck was near the Route 618 area by the Main Gate when it was pulled over. MIRRO gave the officers no problem in taking the Breathalyzer test, but HAMILTON had to take it twice because he had something in his mouth the first time.

Sergeant Daniels, a military police officer for six years,

testified that he was on duty on February 9, 1987, at Lieber Gate when Dunlap, the gate guard at that time, asked him for a field alcasensor. He got in his cruiser to deliver it. When Daniels responded to Dunlap's call for assistance he activated the emergency equipment of his cruiser and chased the red truck which would not stop. Finally Dunlap had to pull in front of the truck to get it to pull over. When Daniels got to the truck the defendant MIRRO was holding on to the grille of the truck and HAMILTON appeared "whipped." Both defendants had trouble standing and emitted very strong smells of alcohol. Each had a driver's license in his possession, but MIRRO's had the words "revoked" stamped on it. He later saw the defendants at the station; both were rowdy, would not sit down, and were intoxicated in his opinion.

On cross-examination Daniels said he was sure he first saw the defendants' truck by Lieber Gate. When asked about the various areas along Route 1 Daniels stated he was sure all of the areas involved in this case were within the jurisdiction of Ft. Belvoir because he had made numerous arrests there before and the court had never thrown the cases out on jurisdictional grounds.

The police car he drove was unmarked, but had red and blue emergency lights and a good siren. He followed the truck a couple of hundred yards and at one point was about 40 feet behind it, but it would not pull over until Dunlap got in front of it.

The last government witness was Specialist Phillips who had been a military police officer for three years. He was the Breathalyzer operator on February 9, 1987. Both defendants chose to take a breath test. Philips testified that he is a licensed Breathalyzer operator who has completed the 40 hour class and given some 60 to 70 tests. HAMILTON's first test had to be discounted because candy was found in his mouth after he blew into the machine. The machine was purged and they waited another 20 minutes before retesting

him. Phillips checked HAMILTON's mouth, found that it was empty and administered the test. The machine showed a blood alcohol reading of .22. The certificate of analysis was admitted into evidence as government *Exhibit No. 1.* MIRRO also took a breath test but without the problems associated with HAMILTON. His test results, introduced as government *Exhibit No. 2*, was a .17.

On cross examination Phillips stated he could not tell what kind of alcohol either defendant had been drinking.

The government recalled Specialist Dunlap who introduced government *Exhibits 3 and 4*, certified Virginia Division of Motor Vehicles' records for the defendants. The court does not recall defendant making any objection to their admission of these records, and has been unable to verify the recollection because the tapes have been unavailable and the transcript has not yet been filed. HAMILTON's record showed convictions for driving while intoxicated in Fairfax County General District Court on November 1, 1978, and Prince William County General District Court on July 24, 1986. As a result of this latter conviction his license was suspended for three years.

MIRRO's record showed convictions for driving while intoxicated in Arlington County on November 5, 1980, and Fairfax County on September 19, 1986. The record also shows that his license was suspended for one year, and he was directed to ASAP, with a restriction that he drive only to and from work and the ASAP meeting.

Defendant HAMILTON testified that he is a divorced plumber. He described the location where the truck first stopped as south of the Fort Belvoir Grill. He said they stopped because he dropped a cigarette and they were looking for it. He was sure they did not stop by Lieber Gate. He said that he and MIRRO had been working and were on their way to a friend's house. He admitted to having had one beer for lunch. As soon as the police cruiser's lights went on he pulled the truck over. He denied weaving in the lane and having

difficulty standing. He claimed he smoked and ate candy before the second breath test, and was not aware of his license being suspended.

The only other evidence offered by either defendant were six photographs, Defendants' *Exhibit Nos. 1 - 6*, of the areas along Route 1. These were offered in support of defendants' claim that the area where their truck was driving was outside the jurisdiction of Fort Belvoir and, therefore, outside the jurisdiction of the court.

Because HAMILTON's driving record did not show that he had been notified that his license was suspended the magistrate found him not guilty of that charge.

/s/ Leonie M. Brinkema

Leonie M. Brinkema
United States Magistrate

Alexandria, Virginia

June 17, 1987

So, no, Mr. Smith under the rules is entitled to submit anything he wants. It doesn't mean that it will necessarily be certified by the magistrate. It simply means that he is entitled to offer that recall, if that indeed is his recall.

THE COURT: All right.

MR. EPNER: Thank you, Your Honor.

THE COURT: Do you want to respond to that?

MR. SMITH: Your Honor, the Government's position I find somewhat infuriating. I just simply want to reiterate that the conviction is based upon the magistrate's recollection and understanding of the factual testimony. We dispute that recollection of the magistrate vigorously. And in the absence of a transcript from which this Court or any other Court can determine what actually the testimony was, then it is impossible to say that these defendants were fairly convicted. The case could not be remanded, and it is not the remedy because double jeopardy prevents a second trial.

THE COURT: Will, I think that the issues or the alleged errors were argued before me on Friday morning. And the thing that I had some question about was the lacking of a transcript of these proceedings when they had been requested by the defendant to be forwarded along with the papers from the magistrate and the records from the magistrate, and they are not here and unavailable. There isn't any question that the rules require that a transcript be prepared. One was not. And the question becomes what effect does that have.

Now, the defendant has cited two Fourth Circuit cases which really didn't deal directly with the issue, but certainly in dicta in the opinion talked about the record being incomplete because a transcript was not submitted. The only case that I

have run across is the case that the Government has cited in its brief this morning, which as I recall is a Tennessee case, *United States versus McCulloch*, from the Eastern District of Tennessee wherein an appeal was ruled on in that case, there was no transcript because the tapes were inaudible and a transcript couldn't be produced. The Court in that case ruled that that wasn't fatally defective, that the rules provide for, Rule 10 provides for a manner in which an appeal can be taken on a statement of facts, and provides a procedure for providing that statement of facts.

I have looked at Judge Warriner's opinion wherein he indicates that the Rules of Appellate Procedure do not apply. It seems to me that I don't have to make that determination. If the Rules of Procedure Apply, Rule 10 provides for a procedure whereby the facts can be put before the District Court so that an appeal can be ruled upon, it provides a procedure for both sides to provide a statement of facts, and that the District Court will make a determination of the facts if they cannot be agreed upon. If the Appellate Rules do not apply, then there would be some lesser standard, I would assume, then Rule 10, as the Government mentioned, some reasonable rule whereby the facts could be brought before the Court for determination.

There are three errors that are alleged, in addition to the fourth one, which is that no transcript was prepared in violation of the rules. And from what I have just said, I don't believe that is fatal when there is another procedure provided for by the rules to get the facts before the Court.

The first error is one of jurisdiction. I have read the magistrate's summary and I have read the defendants' statement of facts, and I really don't find in those two statements any conflict. The magistrate has clearly set out that the testimony she heard. And the evidence that she believed was the officers who said they were beside the gate to Fort Belvoir and that these defendants drove past the gate. That direct

evidence alone would be sufficient, it seems to me, absent some other evidence to the contrary, to show that the gate that has been marked there over some period of time was the boundaries that are in dispute.

The second allegation of error deals with the question of whether or not the defendant Mirro was driving the vehicle. The magistrate in her report indicates that there was direct testimony, eyewitness testimony, that the two defendants changed drivers, and she believed that evidence as opposed to whatever else was put on.

As far as this appeal is concerned, I am bound to view the Government's evidence in its most favorable light. And the magistrate in weighing the credibility of the witnesses believed that eyewitness testimony.

The third assignment of error is that a transcript was received from the Division of Motor Vehicles that was a hearsay piece of evidence. I would find from the record that transcript was a certified copy of the records that are contained in the offices of the Division of Motor Vehicles, and properly admitted.

And on that basis, I do not think the magistrate's rulings were clearly erroneous, and they will be affirmed.

MR. SMITH: If it please the Court, we didn't spend much time on the actual assignments of error because of the problem with the transcript. Could I address a couple of those issues very briefly?

THE COURT: I have already ruled on them, Mr. Smith. I think I heard adequate argument on those, and I spent a good deal of time looking at those from the briefs that were presented.

MR. SMITH: May I present one further request to the Court at this time? It may be appropriate to go back to

A. Yes, I do, Mr. Hamilton and Mr. Mirro.

Q. What about your opportunity to encounter the defendants? What happened that day?

A. While working at 060, I was stationary at Lieber Gate at Fort Belvoir. I was walking back to my vehicle and looking at Route One I saw a red Mazda pickup. It was a red pickup. I didn't know it was a Mazda until later on.

The driver at the time was Mr. Mirro. He stepped out of the vehicle and he proceeded around to the back of the truck. Mr. Hamilton stepped out of the vehicle on the passenger's side and proceeded around to the front.

As they both were going around, Mr. Mirro grabbed the rear tailgate of the truck several times as though he was falling. Mr. Hamilton seemed to grab the mirror on the vehicle before entering the door. He entered the door and he proceeded to drive off at that time.

Q. Excuse me, the area that he was driving on, is that within Fort Belvoir jurisdiction?

THE MAGISTRATE: Well, not at Lieber Gate but on the portion of Route One when you saw the two defendants?

THE WITNESS: On Route One, yes, Your Honor.

THE MAGISTRATE: Of those arrests, which Courts, if any, did they go to?

THE WITNESS: This Court, Your Honor.

THE MAGISTRATE: That's enough of a foundation. I find that jurisdiction has been established.

CAPTAIN DONOVAN: Thank you, Your Honor.

MR. SMITH: Your Honor, I meant to ask you to withhold making that finding until we can get into it a little further until I can voir dire or cross-examine the witness on that matter.

THE MAGISTRATE: All right.

BY CAPTAIN DONOVAN:

Q. After you saw these individuals, what, if anything, did you do?

A. I got in the patrol vehicle. I proceeded

Sergeant?

(Witness complies.)

BY CAPTAIN DONOVAN:

Q. How did you encounter those two individuals that day?

A. I was up at Lieber Gate, the Gate guard called up there for me to administer an Alca-sensor test to somebody.

Q. What, (inaudible) called your attention to these two people?

A. Specialist Dunlap was also at the Gate with another individual. He pointed them out to me. He says --

Q. -- (inaudible) after he pointed them out to you?

A. I saw their red pickup truck that they were driving parked up the side of the road, and the individual Mr. Mirro, right there, I saw him --

THE MAGISTRATE: Which one is Mr. Mirro?

THE WITNESS: That gentleman right there and that other man is Mr. Hamilton.

I saw Mr. Mirro there, he was by the hood, by the grille of the truck in the front and he was around and got in the passenger's side of the truck and the truck drove off.

BY CAPTAIN DONOVAN:

Q. Was there anything unusual about the individuals that you noticed when they were stopped?

A. Right then Mr. Mirro had his hands up (inaudible) it would have been his right hand as he was walking around and getting in the passenger's side of the truck. He was like running his hand along the truck.

Q. What part of Route One is that on?

A. What part of Route One?

Q. Yes.

A. It's the part of Route One that's right across from Lieber Gate.

Q. Is that within Fort Belvoir's jurisdiction?

A. Yes, ma'am, it is.

Q. After you saw them drive up, what did they do that you observed?

A. After Dunlap pointed it out to me, I

which are a couple hundred yards down?

A. If I was on the legal roadway, yes.

Q. That's your understanding, it's the (inaudible) part of Fort Belvoir?

A. The Route One in front of these is, Yes. The Porno Shop itself may not be.

Q. You don't know that of your own personal knowledge, do you?

A. Yes, sir.

Q. How do you know that all of that is? The question is: I'm not asking how do you know" I'm asking -- I'm saying that the gist of the question is how you know that? I am asking you: do you know because you know what land the federal government, either retained, or acquired, from the State of Virginia, or do you know because somebody somewhere along the line told you?

A. I have never gone out there and surveyed the federal property but I have been told where in that area I will enforce the laws of Fort Belvoir and (inaudible)

Q. You are assuming, aren't you, then that those portions --

A. -- no, I was told.

Q. Assuming that the person who told you where to go knew what the boundaries of the federal property are.

A. I believe my operations officer wouldn't tell me a falsehood in reference to jurisdiction.

Q. Is it possible he could be mistaken, innocently?

A. Not that man, no.

MR. SMITH: I would move these exhibits one thru four into evidence.

THE WITNESS: Do I get to look at them?

(Inaudible)

BY MR. SMITH:

Q. Look at all four of them, please.

A. As far as I know all four of these pictures, everywhere Route One, the roadway itself, is shown in those pictures.

Q. One of the pictures shows the right-hand side close to the Gate --

A. -- going up toward Pohick.

CAPTAIN DONOVAN: Your Honor, at this time I would like to have that document admitted into evidence.

MR. SMITH: Subject to cross-examination.

THE MAGISTRATE: (Inaudible)

BY CAPTAIN DONOVAN:

Q. In your opinion from your observation of Mr. Mirro, was he intoxicated?

A. Yes, ma'am, he was.

CAPTAIN DONOVAN: Your Honor, I have no further evidence.

CROSS-EXAMINATION

BY MR. SMITH:

Q. Mr. Phillips, are you aware that alcohol has no odor, the chemical substance of pure alcohol has no odor?

A. Would you repeat the question?

Q. Are you aware that the chemical substance of alcohol has no odor?

A. Alcoholic beverages --

Q. Alcohol itself is odorless, is that correct?

A. I believe so.

THE MAGISTRATE: Captain.

CROSS EXAMINATION
BY CAPTAIN DONOVAN:

Q. Mr. Hamilton, you said you were employed.

A. Yes, I am.

Q. And you were stopped at approximately 1:00 a.m., and you also said -- your testimony is that you were working prior?

A. Yes, I was.

Q. You had just finished working at 1:00 a.m. in the morning?

A. No, it wasn't. Then we went to Woodbridge to go see by boss's son and talk to him.

Q. And the reason you stopped the vehicle -- the reason the vehicle was stopped was because a cigarette was lost somewhere?

A. Yes, I dropped a cigarette.

Q. And you stopped it to retain it. Was it lit or --

A. Yes. We looked for the cigarette.

Q. Was it your last cigarette, Mr. Hamilton?

A. No, we didn't want to put the truck on fire.

Q. Oh, I'm sorry, you dropped it inside, you mean?

(2)

No. 87-2059

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL R. MIRRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for operating a motor vehicle while intoxicated and for operating a motor vehicle without a valid license.

2. Whether petitioner is entitled to a new trial where, because of a partially inaudible tape recording of the proceedings before the magistrate, there was no complete verbatim transcript made of those proceedings.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1988. A petition for rehearing was denied on March 22, 1988. The petition for a writ of certiorari was filed on May 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States Magistrate's Court of Alexandria, Virginia, petitioner was convicted of

driving while intoxicated (DWI) and of driving with a suspended license, both in violation of Virginia law as it applies to federal enclaves through the Assimilative Crimes Act, 18 U.S.C. ~~1902 ed~~. 13. Because petitioner's DWI conviction was his third within ten years, he was subject to an enhanced penalty under Virginia law. The magistrate therefore sentenced petitioner to six months' imprisonment on the DWI charge and indefinitely suspended his driver's license. In addition, the magistrate imposed a consecutive term of ten days' incarceration on the suspended license count. The district court (Pet. App. 1) and the court of appeals (*id.* at 2-6) affirmed the convictions.

1. The pertinent facts are set out in the court of appeals' opinion (Pet. App. 2-3). Petitioner and co-defendant David L. Hamilton were arrested on the evening of February 9, 1987, while they were driving north on U.S. Route One, which passes through portions of Fort Belvoir, a federal military enclave. The arresting officers were two Fort Belvoir military policemen who first noticed petitioner and Hamilton when the truck in which they were traveling pulled over to the side of the road in the federal enclave near a gate to the fort (*id.* at 10-11). The officers saw a man—identified as petitioner—get out of the truck on the driver's side, walk unsteadily around the rear of the vehicle, and climb into the passenger's seat. At the same time, they saw a second man get out of the truck on the passenger side, walk around the vehicle, and climb into the driver's seat. The truck then drove off down Route One, weaving in and out of its lane. After following the truck for a short period of time, the officers pulled it over and asked the occupants to get out. Hamilton climbed out of the driver's seat, and petitioner got out on the passenger side. Both men smelled strongly of alcohol and had trouble standing. Each produced a driver's license

upon request, but petitioner's had the word "REVOKED" stamped across it. *Id.* at 3, 8-11.

The officers took petitioner and Hamilton to the police station, where they were given breathalyzer tests. The machine showed Hamilton's blood alcohol level to be .22 and petitioner's to be .17, both in excess of the legal limit for the operation of a motor vehicle. A license check revealed that the licenses of both men were under suspension. Pet. App. 3-4, 11-13.

2. Petitioner and Hamilton waived their right to trial before a jury, entered pleas of not guilty, and consented to be tried together before a federal magistrate. At trial, the government introduced the testimony of the arresting officers. In addition, over the defendants' objection, the government introduced copies of the defendants' Virginia driving records (GXs 3-4), which revealed the prior DWI offenses and suspensions, and documentation describing the results of the breathalyzer tests (GXs 1-2). The magistrate found both petitioner and Hamilton guilty. Pet. App. 11-12.

At the time of petitioner's trial, the proceedings in magistrate's court were tape-recorded pursuant to 18 U.S.C. 3401(e). It was later discovered, however, that a complete verbatim transcript of the proceedings could not be prepared, because the tape recordings were found to be partially inaudible. Transcripts were made of the portions of the tape recordings that were audible (see Pet. 9-10) and, in addition, the magistrate prepared a written summary of the proceedings (Pet. App. 8-13) in which she gave a witness-by-witness narrative account of the evidence that was adduced at the trial.

After a hearing, the district court ruled that the partial unavailability of a verbatim transcript of the trial proceedings neither warranted the dismissal of the charges nor

entitled petitioner to a new trial. Petitioner alleged that he was prejudiced by the unavailability of a complete transcript because (1) he was unable to contest the sufficiency of the evidence as to whether the offense occurred on the premises of Fort Belvoir; (2) he was unable to contest the sufficiency of the evidence as to whether he was driving the truck; and (3) he was unable to contest the admissibility of his prior DWI adjudications. As the district court explained, however (Pet. App. 15-16):

> The first error is one of jurisdiction. I have read the magistrate's summary and I have read the defendants' statement of facts, and I really don't find in those two statements any conflict. The magistrate has clearly set out * * * the testimony she heard. And the evidence that she believed was the officers who said they were beside the gate to Fort Belvoir and that these defendants drove past the gate. That direct evidence alone would be sufficient, it seems to me, absent some other evidence to the contrary, to show that the gate that has been marked there over some period of time was the boundaries that are in dispute.
>
> The second allegation of error deals with the question of whether or not [petitioner] was driving the vehicle. The magistrate in her report indicates that there was direct testimony, eyewitness testimony, that the two defendants changed drivers, and she believed that evidence as opposed to whatever else was put on. As far as this appeal is concerned, I am bound to view the Government's evidence in its most favorable light. And the magistrate in weighing the credibility of the witnesses believed that eyewitness testimony.
>
> The third assignment of error is that a transcript was received from the Division of Motor Vehicles that was a hearsay piece of evidence. I would find from

the record that transcript was a certified copy of the records that are contained in the offices of the Division of Motor Vehicles, and properly admitted.

3. The court of appeals affirmed (Pet. App. 2-6). In rejecting petitioner's challenge to the sufficiency of the evidence, the court first stated that the government amply proved that the offense occurred within the boundaries of a federal enclave, since "[t]wo experienced military policemen testified that they knew the boundaries of Fort Belvoir and were certain that * * * they arrested [petitioner] * * * within those boundaries" (*id.* at 5). The court also held the certified copies of petitioner's driving records—which were found to be admissible as self-authenticating documents under Fed. R. Evid. 902(2)—were sufficient to establish petitioner's prior DWI offenses (Pet. App. 5). Finally, the court held that there was sufficient evidence, based on the credited testimony of one of the arresting officers, to show that petitioner had been driving the vehicle (*id.* at 5-6). The court of appeals did not address the claim that petitioner was entitled to a new trial because of the unavailability of a complete transcript of the trial proceedings.

ARGUMENT

1. Petitioner first contends (Pet. 11-13) that the evidence was insufficient as a matter of law to establish that he was operating the motor vehicle. His claim is without merit. As the court of appeals stated, "It is undisputed that there were only two men in the truck. One of the military policemen testified that he saw [petitioner] climb out of the driver's seat immediately after the truck pulled over to the side of the road, and that he saw Hamilton climb out of the passenger seat at the same time" (Pet. App. 5-6). The officer saw the two men walk around the parked

truck, switch positions, and then drive off. When the officers stopped the truck a short time later, Hamilton was driving and petitioner was in the passenger seat. That evidence was more than ample to establish that petitioner was driving the truck when it stopped and the passengers exchanged places.

The evidence was also sufficient to establish that petitioner was under the influence of alcohol when he was driving the truck. In her summary of the proceedings, the magistrate noted that the breathalyzer test results were admitted at trial and showed that petitioner's blood alcohol exceeded the legal limit in Virginia (Pet. App. 12). Petitioner argues that the transcript of the trial does not reflect that the breathalyzer test results were ever admitted at trial. But the magistrate's remark at the time the test results were offered was inaudible on the tape recording and therefore could not be included in the verbatim transcript (see *id.* at 17). Under those circumstances, the magistrate's statement in her summary of the proceedings that the breathalyzer results were admitted as Government Exhibit 2 is sufficient to establish that the evidence was admitted.

2. Petitioner next claims (Pet. 14-16) that the unavailability of a complete verbatim transcript of the trial denied him due process and violated his rights under 18 U.S.C. 3401(e) and Rule 7(c) of the Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates. Section 3401(e) requires that "[p]roceedings before the United States magistrates * * * shall be taken down by a court reporter or recorded by suitable sound recording equipment," and Rule 7(c) provides that the record for an appeal to the district court "shall consist of * * * any transcript, tape, or other recording of the proceedings * * *." In this case, however, a complete verbatim record of petitioner's trial could not be produced, because the

tape recording of the trial proceedings turned out to be partially inaudible. In light of that mechanical failure, the magistrate prepared a detailed, witness-by-witness summary of the proceedings in order to complete the record for possible review. Petitioner claims that that procedure was inadequate and that he is entitled to a new trial because of the failure of the recording equipment.

As a constitutional matter, criminal defendants are not invariably entitled to receive a complete verbatim trial transcript in order to pursue an appeal. In *Draper* v. *Washington,* 372 U.S. 487, 495 (1963), this Court recognized that the use of "[a]lternative methods of reporting trial proceedings are permissible," including "a full narrative statement based * * * on the trial judge's minutes taken during trial." Similarly, not every failure of a court reporter to comply with statutory recordation requirements results in per se reversible error. See, *e.g., Addison* v. *United States,* 317 F.2d 808, 810-811 (5th Cir. 1963), cert. denied, 376 U.S. 905 (1964). Thus, where, as here, a defendant had the same counsel at trial as on appeal, the defendant must show some prejudice before he is entitled to a new trial because of the absence of a complete verbatim transcript of the trial proceedings. See *Bransford* v. *Brown,* 806 F.2d 83, 86 (6th Cir. 1986), cert. denied, No. 86-6657 (May 18, 1987); *United States* v. *Taylor,* 607 F.2d 153 (5th Cir. 1979); *United States* v. *Ullrich,* 580 F.2d 765, 773 n.13 (5th Cir. 1978) (missing exhibit). That is especially true when, as here, the judge who had presided at trial is able to reconstruct the record from his notes and memory.

By statute, criminal proceedings in district court, like criminal proceedings in magistrate's court, must be recorded verbatim, 28 U.S.C. 753, and the record on appeal includes the "transcript of proceedings" in the district

court, Fed. R. App. P. 10(a). Despite that mandatory language, Fed. R. App. P. 10(c) provides that in cases in which no report of the proceedings at trial was made, or a transcript is unavailable, the parties can reconstruct the record with the assistance of the court. When Rule 10(c) is used to reconstruct a missing record, no new trial is required where it appears that the accused has suffered no actual prejudice. See *United States* v. *Smaldone,* 583 F.2d 1129, 1133-1134 (10th Cir. 1978), cert. denied, 439 U.S. 1073 (1979) (reconstruction of record regarding the missing testimony of three witnesses, including that of two co-defendants).

There is no reason why the same principle should not be applied to trials before a magistrate. By furnishing the district court with a detailed summary of the proceedings at trial, the magistrate effectively followed the procedure set forth in Fed. R. App. P. 10(c). See *United States* v. *McCulloch,* 562 F. Supp. 103, 105 (E.D. Tenn. 1983) (Fed. R. App. P. 10(c) applied to case in which tape recorders failed to operate during trial, but magistrate prepared extensive summary of proceedings). Although Fed. R. App. P. 10 is not by its terms applicable to magistrates' proceedings, a magistrate is free to apply the procedures established by that rule in appropriate cases. Rule 57 of the Federal Rules of Criminal Procedure provides that "in all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules * * *." Rule 10(c) of the Federal Rules of Appellate Procedure, which is not inconsistent with any of the rules applicable to magistrates' proceedings, is an eminently sensible means of proceeding in cases such as this.*

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* *Hardy* v. *United States,* 375 U.S. 277 (1964), on which petitioner relies, is inapposite. *Hardy* did not deal with the instant situation in

Petitioner has failed to show that he was prejudiced by the absence of a complete transcript of the trial. He claims (Pet.10) that the magistrate's summary was inaccurate because it "fail[ed] to recognize the inherent and critical disparity in testimony" of the two officers. That disparity consisted, at most, of a difference in opinion as to whether petitioner walked in front of the truck or in back of the truck when he changed places with Hamilton; petitioner does not suggest that there was any dispute between the officers on the critical question whether the exchange took place. Nor is the verdict undermined by the fact that petitioner's co-defendant, Hamilton, testified that he had been driving the truck the entire time. The magistrate could properly credit the testimony of the two sober and experienced officers over the testimony of petitioner's

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which the trier of fact has provided a narrative summary of the evidence in order to augment transcripts that are only partially complete because of an inadvertent failure of the recording device to produce a fully audible tape recording. In *Hardy*, the trial proceedings had been transcribed in their entirety; the question was whether an indigent defendant was entitled to access to a transcript while pursuing his appellate rights. As a matter of statutory construction, the Court held that "where the requirements of a nonfrivolous appeal * * * are met, or where such a showing is sought to be made, and where counsel on appeal was not counsel at the trial, the requirements placed on him [to render effective assistance of counsel on appeal] * * * cannot be discharged unless he has a transcript" of the trial proceedings (*id.* at 282). The Court in *Hardy* did not in any way suggest that the absence of a complete transcript because of a technical recordation problem would automatically entitle a defendant to a new trial. Likewise, while petitioner is correct in asserting (Pet. 15) that courts have held that the failure to make a record of the proceedings in a trial before a magistrate can constitute reversible error, the court of appeals cases on which he relies involved the complete failure to make any record of the proceedings, not a mechanical failure in the recording equipment resulting in gaps in the record that are filled in by the magistrate's summary of the proceedings.

co-defendant who was drunk at the time of the incident and had a motive to protect petitioner.

In addition, petitioner contends (Pet. 10) that he was prejudiced by the use of the summary of proceedings, because in her summary the magistrate stated that she did not recall whether petitioner objected to the admission of his Virginia driving records, while the transcript subsequently showed that he did make such an objection. Since the transcript covered that point, petitioner could not have been prejudiced by the magistrate's failure to recall whether an objection was made. In any event, as both the district court (Pet. App. 16) and the court of appeals (*id.* at 5) observed, the records were properly admitted whether or not an objection was made.

Finally, the record does not support petitioner's claim (Pet. 10) that, contrary to the magistrate's summary, "the transcription clearly shows there was no admission of [the Certificate of Analysis]" concerning his breathalyzer tests. As the transcript shows (see Pet. App. 17), the prosecutor moved for admission of the certificate, in response to which defense counsel merely noted, "Subject to cross-examination." The magistrate then made an inaudible response. That exchange cannot be categorized as a "clear[ ]" demonstration that the certificate was never admitted. To the contrary, the magistrate's notation in her summary that the Certificate of Analysis was admitted strongly suggests that her inaudible response to the prosecutor's motion was to admit the certificate. At all events, petitioner could not have been prejudiced in this regard either. As petitioner acknowledges (Pet. 8), "[t]estimony was elicited that [his] test indicated a blood alcohol count of 0.17%" and there was other testimony—both transcribed (see, *e.g.*, Pet. App. 21) and as recounted by the magistrate (*id.* at 10-11)—that indicated that petitioner

was visibly intoxicated. Thus, the certificate was merely cumulative evidence that was not essential to his conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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